

IN PRACTICE

ALTERNATIVE DISPUTE RESOLUTION

Where To Go for Emergent Relief

Using AAA's optional rules for emergency measures to further client's best interests

By Michael L. Rich

Although significantly less utilized than emergent applications to a court, seeking temporary restraints or preliminary injunctive relief in arbitration can, in some instances, best serve a client's interests.

Consider, for example, a business that requires its employees or independent contractors to sign a contract with a noncompetition clause. Clients who conduct business throughout the country face a challenging legal terrain when it comes to enforcing these restrictive covenants. Because this is a state law issue, a business might encounter inconsistent court treatment from state to state. This creates potential legal uncertainty. To try to avoid or lessen the effect of differing state law, many companies utilize a binding arbitration clause in their contracts.

Though hopefully effective to limit litigation expenses and to expedite the legal process, arbitration clauses often do not address the ability to obtain

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emergency injunctive relief. In the past, if a party needed a temporary restraining order to prevent a former employee or contractor from violating the restrictive covenant, it generally had to seek relief from a court. The dual purpose of this article is to increase awareness regarding the existence of emergent relief through arbitration, as well as to synthesize and discuss the benefits and risks of seeking emergent relief from an arbitrator rather than from a court.

Procedure for Obtaining Interim Relief in Arbitration

Recognizing this impairment on the arbitrator's ability to resolve completely a matter outside of the courtroom, the American Arbitration Association (AAA) created its Optional Rules for Emergency Measures of Protection. These rules enable parties to obtain interim relief from an emergency arbitrator. To invoke these rules, the parties must either agree to them in the arbitration clause, consent to them after a dispute arises or utilize them pursuant to a court order. The moving party must serve written notice on the AAA and all other parties, citing the basis for invoking the Optional Rules, detailing the type of emergency relief sought and giving the reasons why the emergency arbitrator should grant it. The AAA will appoint an emergency arbitrator within one business day of receiving this notice. Upon a showing that "immediate

and irreparable loss or damage will result in the absence of emergency relief," the emergency arbitrator may enter an interim award granting the injunctive relief sought.

Recognition of an Arbitrator's Capacity to Grant Emergent Relief

In 2003, The N.J. Revised Uniform Arbitration Act (the Revised Act) enhanced the legal enforceability of an arbitrator's interim award. The Revised Act, in pertinent part, states that:

[T]he arbitrator may issue orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and pursuant to the same conditions as if the controversy were the subject of a civil action...

N.J.S.A § 2A: 23B-8. Prior to an actual controversy, the parties cannot waive the ability of an arbitrator to provide provisional remedies, including interim relief. N.J.S.A. § 2A-23B-4.

If a party violates a temporary restraining order as mandated by a court, that party could be held in contempt. But, what happens if a party violates an emergency arbitrator's interim award?

After receiving an award, the prevailing party can file a summary action with the court to confirm the award. N.J.S.A. §2A:23B-21. Violation of a confirmed award can result in contempt or any other remedy available had the court itself granted the injunctive relief. N.J.S.A. § 2A:24-10. Though enforcing interim injunctive relief from an arbitrator might require an additional procedural hurdle, the plain language of these statutes indicates that these two manners of preliminary injunctive relief are equally enforceable.

Advantages of AAA's Emergency Rules

One goal of pursuing this approach is to obtain consistent results — in our example, to try to subject all of a company's employees or independent contractors to the same law and procedure in the enforcement of a post-termination restrictive covenant. This consistency potentially affords the company the ability to litigate in one virtual jurisdiction. This can be in the client's best interests because the client will retain the business benefit of a nationwide presence, while maintaining the legal and administrative simplicity of one jurisdiction. This approach may also provide continuity by using one attorney who can be the client's "one-stop shop" for all disputes arising from a given contractual provision, even though the attorney might only be admitted or maintain an office in one state.

A related advantage of utilizing the AAA's Optional Rules is that it may allow for avoidance of less favorable law in certain jurisdictions. For example, by providing for emergency arbitration pursuant to a specified choice of law, a business might avoid jurisdictions more hostile to enforcement of noncompete provisions. Because the unfavorable law of those jurisdictions could present impediments to enforcement, the arbitration option pursuant to specified law can be invaluable. Indeed, in some cases, this approach might be the only chance of

obtaining enforcement of the contractual restrictions.

Disadvantages of Seeking Emergency Relief in Arbitration

The major disadvantages of obtaining an interim award from an AAA arbitrator can be divided into two categories: cost and time. Each of these disadvantages has several layers that will dictate the magnitude of the disadvantage. In regard to cost, there are two major differences between initiating an action for emergent relief in court and through arbitration. First, in court a party can file and serve the complaint for less than \$300, whereas a party filing for emergent relief in arbitration must bear all of the initial filing cost, about \$3,000. Although this upfront cost borne by the moving party can be apportioned in the final award, that is not always the result.

In arbitration, unlike matters presented in court, the parties must pay for the arbitrator's time at an hourly rate. Thus, a party must not only pay for its own attorney, but also for his portion of the arbitrator's fees for reading the submissions, hearing the arguments, and rendering a decision. Additionally, the desire to confirm, vacate or enforce both interim and final awards adds steps to the process, thereby potentially increasing the overall litigation costs. This cost concern is exacerbated because emergency arbitrators, who narrowly decide the issue of interim relief, and permanent arbitrators, who decide the final award, usually are different people. This is so because AAA assigns the emergency arbitrator, whereas the parties mutually select the permanent arbitrator. Because the parties must also pay for the permanent arbitrator's time, there will be additional costs associated with the permanent arbitrator being brought up to speed and adjudicating a final award. These additional costs could be significant depending on the complexity of the issues and procedural history,

and the contentiousness of the parties. Finally, AAA generally imposes the cost of the emergency arbitrator solely on the claimant who requested the emergency relief. In some instances, the permanent arbitrator's fees also can fall solely upon the claimant — e.g., where the respondent fails to pay his share or, in the employment context, where other laws or regulations may preclude imposing such a charge on the employee. Unfortunately, this means that the client ultimately could have to pay for both the emergency and permanent arbitrators.

Another important consideration in assessing whether to seek emergent relief in arbitration is the speed of obtaining and enforcing such relief. Even if an emergency arbitrator renders a decision in the same expeditious timeframe as a court might, there may be a need to seek judicial confirmation or enforcement of the interim award. As the scope of permitted discovery and motions continues to expand in arbitration proceedings, it is becoming less assured that arbitration will consistently produce a quicker resolution than a court proceeding.

The Client's Best Interests Demand Strategic Flexibility

Which approach is in the client's best interest depends upon careful evaluation of these various strategic considerations. Thus, the pros and cons of pursuing emergent relief through arbitration should be analyzed on an individual basis, subject to the client's tolerance to pay less predictable costs and in accordance with the client's priorities and goals. Best practice may be to advise the client to include in the arbitration clause both court and arbitration options for emergency injunctive relief, as well as choice of law. This might provide the client the necessary flexibility to appropriately weigh the advantages and disadvantages of using the AAA's Optional Rules when a dispute arises. ■